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No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1941

SCRIPPS-HOWARD RADIO, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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OPINION BELOW

An opinion of the Court of Appeals and a dissenting opinion of Justice Stephens were entered on February 3, 1941, and are printed in the record at pages 4–18 and 19–48, respectively. The Court of Appeals later set aside its opinion and, after reargument, issued its certificate to this Court (see R. 2).

JURISDICTION

The jurisdiction of this Court is invoked under Section 239 of the Judicial Code, 28 U. S. C. § 346. There is, however, a question, discussed *infra*, pp. 11–14, whether this Court has jurisdiction.

QUESTIONS PRESENTED

The question certified by the United States Court of Appeals for the District of Columbia reads as follows (R. 3):

> Where, pursuant to the provisions of Section 402 (b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?

The certification of this question in turn presents the questions whether the United States Court of Appeals for the District of Columbia has power to certify to this Court a question arising out of an appeal to that court from an order of the Federal Communications Commission, and, if so, whether the certificate here involved is defective as being of objectionable generality.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Appendix A, *infra*, pp. 36–46.

STATEMENT

The facts as stated in the certificate (R. 1–2) and as supplemented by pertinent facts not in dispute shown by the Commission's opinions and

orders, which are set forth in Appendices B and C, *infra*, pp. 47–60, may be summarized as follows:[1]

Appellant is the licensee of radiobroadcasting station WCPO, which operates in Cincinnati, Ohio, on 1200 kilocycles with 250 watts power. In October 1939 the Commission granted without hearing[2] the application of WCOL, Inc., licensee of Station WCOL at Columbus, Ohio, for a construction permit authorizing it to install the equipment necessary to change its frequency from 1210 kilocycles to 1200 kilocycles and to increase its power from 100 watts to 250 watts (Appendix B, *infra*, p. 47).

[1] Certain of the procedural steps taken by the court below and the dates thereof are set forth in the statement though not included in the certificate or shown by the Commission's opinions or orders. These, together with the pertinent facts not stated in the certificate but shown by the Commission's opinions and orders, are set out in the belief that they will aid in an understanding of the issues raised by the certificate. Although in other cases this Court has declined to consider facts not stated in the certificate, it may wish to do so here where the additional facts are undisputed and where many of them are within the scope of judicial notice. Cf. *United States* v. *Thomas*, 151 U. S. 577, 580, 581; *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 307.

[2] One of the issues raised by the appeal is the validity of the Commission's action in granting the application of WCOL without a hearing. The Commission has held (see Appendix B, *infra*, p. 52) that Section 309 (a) of the Communications Act of 1934 specifically confers this power on it. The court below has postponed argument and decision on the merits until after disposition of the petition for stay.

Appellant filed with the Commission a "petition for hearing or rehearing" directed against the grant of the WCOL application. The Commission denied this petition and on April 2, 1940, issued an opinion (Appendix B, *infra*, pp. 47–56) in which it pointed out that although the grant of the WCOL, Inc., application would mean a loss of 20,800 listeners within the primary service area of appellant's station, it would result in an increase of 146,000 listeners within the interference-free service areas of WCOL and of WHIZ and WLOK, located in Zanesville and Lima, Ohio, respectively (Appendix B, *infra*, p. 55–56).

On April 11, 1940, appellant filed in the court below its appeal from the Commission's orders granting the construction permit and denying appellant's "petition for hearing or rehearing." At the same time it also filed a petition for an order "suspending the effectiveness" of the Commission's decision granting the permit to WCOL, Inc., pending determination of the appeal. (R. 1, Appendix C, *infra*, p. 57.)

After WCOL, Inc., had completed the changes authorized by its construction permit, it applied to the Commission for a station license in accordance with Section 319 (b) of the Communications Act[1] (Appendix C, *infra*, p. 58). Thereupon

[1] Under Section 319 the construction permit issued by the Commission does not authorize operation of a station but only its construction. Under Sections 301 and 319, a license is necessary before regular operation can begin.

appellant filed in the court below a supplement to its petition for a stay order praying that the terms of the order should be extended to stay the issuance of a license. On June 3, 1940, the Commission granted the application of WCOL, Inc., for a station license.[4] Thereafter, appellant filed with the Commission its "petition for hearing or rehearing" of the Commission's action in issuing the license to WCOL, Inc. The Commission denied this petition on July 19, 1940. (Appendix C, *infra*, pp. 58–60.)

On July 24, 1940, appellant appealed to the court below from the grant of the station license, and a month later the two appeals were consolidated.

Briefs in support of and in opposition to the petition for stay were filed with the court below

[4] In view of the facts that the changes authorized by the construction permit have been completed and that WCOL, Inc., already has been granted a license to operate, it is arguable that the question certified, as distinct from the merits of the appeal to the court below, is moot and that the certificate should be dismissed for that reason. However, we do not so contend. Appellant's prayer for an order suspending "the effectiveness" of the grant of the construction permit may be construed broadly in the light of the apparent purpose of the petition for stay as the equivalent of a prayer for an order which would prevent WCOL, Inc., from operating pending the appeal. Moreover, the power of the Court of Appeals to issue stays on appeals from the Commission is a question which involves public interests and is likely to recur. Cf. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 304–305; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516.

and oral argument was had on November 15, 1940. On February 3, 1941, the court, with one justice dissenting, denied the petition for stay and rendered an opinion holding that it had no power to stay action of the Commission pending disposition of an appeal (R. 2, 4–48). Thereupon appellant filed a motion for reargument before all six judges composing the Court of Appeals. On March 13, 1941, the Court granted the motion and thereafter set aside its opinion. Reargument was had before the full court on April 7, 1941 (R. 2). No further action was taken by the court until August 8, 1941, when it issued its certificate to this Court.

SUMMARY OF ARGUMENT

I

A. Some doubt exists as to whether the Court of Appeals possesses the power to certify questions arising on appeals to it from the Federal Communications Commission. The general authorization to certify questions found in Section 239 of the Judicial Code would seem to be broad enough to cover all types of cases in the Court of Appeals. However, Section 402 (e) of the Communications Act provides that the judgment of the Court of Appeals shall be final subject to review by this Court upon writ of certiorari, and makes no mention of certification. Moreover, a predecessor bill relied on in the drafting of the Communications Act made provision for both certification and cer-

tiorari, and the provisions of many other statutes governing the review of action taken by administrative agencies specify both certification and certiorari as methods of review by this Court.

B. Even if the Court of Appeals has authority to certify the present question to this Court, the certificate should be dismissed because the question certified is of "objectionable generality." The question certified is not in terms limited to whether the Court of Appeals has power under the Act to grant a stay of the particular order or type of order issued by the Commission in this case, but apparently asks whether the Court has power to stay the execution of any order of the Commission appealed pursuant to Section 402 (b) of the Communications Act. To answer the question, this Court would be obliged to consider the various types of orders which may be appealed under Section 402 (b) and all situations which might possibly arise thereunder.

II

A. The Communications Act of 1934 withholds from the Court of Appeals the power to grant a stay order in appeals under Section 402 (b). Thus, while Section 402 (a) of the Act, which provides for appeals to three-judge courts in cases not appealable to the Court of Appeals under Section 402 (b), incorporates by reference the preliminary injunction procedure of the Urgent Deficiencies Act, no similar provision is made in

connection with appeals under Section 402 (b). The nature of the respective types of Commission action reviewable under these sections reinforces the conclusion that this omission reflects a deliberate Congressional judgment.

Section 402 (a) comprehends review of carrier matters and such radio matters as revocation of a license or modification of a license on the Commission's own motion. In these situations the grant of a stay power seems appropriate. However, in situations where Commission action is appealable to the Court of Appeals under Section 402 (b) the exercise of a stay power would involve administrative rather than judicial functions or would be otherwise inappropriate. Where, for example, an applicant appeals under Section 402 (b) (1) from Commission action denying his application for a construction permit, a license, or a modification or renewal of a license, the grant of a stay by a court would involve the exercise of an administrative judgment exclusively entrusted to the Commission by Congress.

In a case like the instant one appealed under Section 402 (b) (2) by a "person aggrieved or whose interests are adversely affected" by action of the Commission granting an application, Congressional failure to grant power to issue stay orders is explained by the nature of the interests which are concerned. A licensee who appeals from

Commission action authorizing a new station which will either compete with his existing station or cause electrical interference to it can assert no injury to a private right. See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. The right granted by the license—to operate transmitting equipment for a designated time on a certain frequency with particular power during enumerated hours of the day and night—is not infringed. Since interim stays, not necessary to safeguarding the jurisdiction of the court, are generally designed for the protection of private rights, it would be strange if Congress had provided a stay order power in situations like the instant where the jurisdiction of the court is not endangered and no such rights are involved.

The legislative history of Section 402 further shows that Congress did not intend the Court of Appeals to issue stay orders pending determination of an appeal. In drafting Section 402 Congress had before it and relied extensively on H. R. 7716, 72d Cong., a bill which had been passed by both houses of Congress one year before the enactment of the Communications Act, but failed of enactment because of a pocket veto. That bill contained an express provision conferring a stay order power on the Court of Appeals. The inclusion of such a provision in H. R. 7716 and its

omission from the Communications Act when adopted a year later is clear indication that the omission was deliberate.

B. No other statute confers upon the Court of Appeals the power to issue stay orders. Appellant relies on Section 262 of the Judicial Code and Section 33 of Title 18 of the District of Columbia Code (now found in Title 11–208, 1940 ed.) These provisions give to the Court of Appeals power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction.

These general statutes should not be construed as conferring power to stay orders of the Communications Commission, in view of the specific congressional intention, reflected in the Communications Act, to withhold such power. Moreover, the function of the Court of Appeals is limited to laying bare errors of law committed by the Commission. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. Hence, the "all writs" statute would in any event only give to the Court of Appeals the power to issue writs necessary to protect the jurisdiction of that Court to determine whether the Commission had committed errors of law. And a stay is not necessary for that purpose, since the Court of Appeals can review the Commission's action in granting the application from which appellant is appealing whether or not the action of the Commission is stayed in the interim. If the Court of

Appeals uncovers an error on final judgment, the Commission must revise its action in accordance with the directions of the Court.

ARGUMENT

THERE IS DOUBT WHETHER THE COURT OF APPEALS HAS POWER TO CERTIFY QUESTIONS TO THIS COURT ON APPEALS ARISING UNDER THE COMMUNICATIONS ACT. IN ANY EVENT, THE CERTIFICATE SHOULD BE DISMISSED BECAUSE THE QUESTION CERTIFIED IS TOO GENERAL

A. IT IS DOUBTFUL WHETHER THE COURT OF APPEALS IS AUTHORIZED TO CERTIFY QUESTIONS ARISING ON APPEALS UNDER THE COMMUNICATIONS ACT

Although the Government takes no position on the question whether the Court of Appeals is authorized to issue certificates in cases appealed to that court under the Communications Act of 1934, it is of opinion that it should at the outset call this Court's attention to the fact that the answer to the question is doubtful. We will state the considerations looking each way.

Section 239 of the Judicial Code (28 U. S. C., § 346) provides:

> In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals for the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the case * * *.

This language would appear to be broad enough to authorize the court below to certify questions

arising on appeal from the Federal Communications Commission. And as a matter of policy it would seem undesirable that any one class of cases should be singled out for exclusion from the certification power.

There are, however, some indications that Congress intended that questions arising on appeal from the Federal Communications Commission should not be brought to this Court by certificate, but only on certiorari. The provision (Section 402 (e)) of the Communications Act dealing with review by this Court of cases in the Court of Appeals speaks only of certiorari. It reads as follows:

> * * * The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

The omission from the statute of any reference to certification gains added significance from the fact that a predecessor bill which was much drawn on in the drafting of the 1934 Act did contain a provision for certification. That bill was H. R. 7716, 72d Congress, which was passed by both houses of Congress in 1933 but was pocket vetoed. See *infra*, p. 26. It provided (Section 16 (g)):

> The jurisdiction of the Court of Appeals of the District of Columbia under this sec-

> tion to review any decision or order of the commission shall be exclusive * * * and the judgment of said court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari as provided in section 240 of Judicial Code, as amended (U. S. C., title 28, sec. 347), and that nothing in this section shall be construed to prevent the application of section 239 of the Judicial Code, as amended (relating to certification of questions of law) (U. S. C., title 28, sec. 346), to cases in the Court of Appeals of the District of Columbia arising under this section.[5]

The Communications Act, in failing to provide for certification as an alternative mode of review, contrasts also with the numerous regulatory statutes which do expressly provide for Supreme Court review by certification as well as by certiorari.[6] Two

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[5] The Radio Act of 1927, which was a precursor of the 1934 Act, conferred upon the Court of Appeals power both to review and to revise determinations of the Federal Radio Commission, and contained no provision for review by this Court. See *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464. In 1930 the Radio Act of 1927 was amended to limit the Court of Appeals to purely judicial functions, so that its decisions might be reviewed by this Court. The 1930 Amendment provided for review by certiorari; like the present Act, it did not mention certification. See 46 Stat. 844, 845.

[6] See Federal Power Act, 16 U. S. C., Sec. 825 (l); Civil Aeronautics Act of 1938, 49 U. S. C., Sec. 646 (f); Securities Act of 1933, 15 U. S. C., Sec. 77 (i); Natural Gas Act, 15 U. S. C., Sec. 717 (r); Tariff Act of 1930, as amended, 19

such statutes which originally provided only for review by certiorari were changed on subsequent amendment so as to provide for certification as well.[7] There are, on the other hand, various statutes which, like the Communications Act, make provision for certiorari but contain no reference to certification.[8] No case has been found in which questions have been certified under any of these statutes.

B. IN ANY EVENT, THE CERTIFICATE SHOULD BE DISMISSED ON THE GROUND THAT THE QUESTION CERTIFIED IS OF OBJECTIONABLE GENERALITY

If the Court holds that the court below had power to issue the certificate in this case, and hence that this Court has jurisdiction, it should nevertheless dismiss the certificate.

This Court has consistently refused to answer and has said that it will not answer "abstract

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U. S. C., Sec. 1641; Securities Exchange Act of 1934, 15 U. S. C., Sec. 78 (y); Public Utility Holding Company Act of 1935, 15 U. S. C., Sec. 79 (x); National Labor Relations Act, 29 U. S. C., Sec. 160 (e); Investment Advisers Act of 1940, Sec. 213 (a), 54 Stat. 855; Federal Alcohol Administration Act, 27 U. S. C., Sec. 204 (h); Fair Labor Standards Act of 1938, 29 U. S. C., Sec. 210 (a); Bituminous Coal Act of 1937, 15 U. S. C., Sec. 836 (b).

[7] Clayton Act (Sec. 11, 38 Stat. 735) and the Federal Trade Commission Act (Sec. 5, 38 Stat. 720). Congress subsequently specifically provided for review by certification as well as certiorari (Act of Feb. 13, 1925, Sec. 2, 43 Stat. 939; Act of May 20, 1926, Sec. 13 (b), 44 Stat. 587).

[8] See, e. g., Packers and Stockyards Act of 1921, 7 U. S. C., Sec. 194 (h); Grain Futures Act, 7 U. S. C., Sec. 10.

questions unrelated to the pending controversy, or questions unnecessarily general, or questions which admit of one answer in one set of circumstances and a different answer in another, the differentiating circumstances being imperfectly disclosed." *Lowden* v. *Northwestern National Bank and Trust Co.*, 298 U. S. 160, at 162; *White* v. *Johnson*, 282 U. S. 367; *Triplett* v. *Lowell*, 297 U. S. 638; *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563; *National Labor Relations Board* v. *White Swan Co.*, 313 U. S. 23. See also Rule 37 of the Rules of this Court, which provides that questions certified "must be distinct and definite."

Under these standards, it is clear that the question certified in this case should not be answered. The question as formulated (*supra*, p. 2) is not limited to the precise issue before the court below, namely, whether in the circumstances the court has power to stay the effectiveness of the order of the Commission granting the application for a construction permit. Nor is it even limited to the question of the court's power in general to stay Commission orders of the type here involved, that is, orders granting applications for construction permits. On the contrary, it apparently asks whether the court has power to stay any order which may be appealed under Section 402 (b). Thus, to answer the question, this Court would be obliged to consider the various types of orders which are appealable

under that section and all possible factual situations which might arise. No such duty should be imposed. Indeed, for the Court to be asked to determine questions not in issue between the parties, amounts, in effect, to a request that it exceed its constitutional authority to decide cases and controversies.

The improper generality of the question certified appears most evidently when examined in the light of the different orders which may be appealed under Section 402 (b) (1), (2), and (3) and of the diverse considerations which they may raise in connection with the propriety of interim stays and the power to issue them. Under Section 402 (b) (1) an appeal may be taken by the applicant from an order of the Commission denying an application for a construction permit or license or for a renewal or modification of an existing license. Under Section 402 (b) (2)—pursuant to which the appeal was taken in the instant case—an appeal may be taken by any person aggrieved or whose interests are adversely affected by action of the Commission granting or denying an application of the type covered by Section 402 (b) (1). Under Section 402 (b) (3) an appeal may be taken by a radio operator whose license has been suspended by the Commission. As is pointed out hereinafter (pp. 20–22), so far as stay orders are concerned, the considerations which are applicable to appeals under Section 402 (b) (1) from orders

denying applications may be somewhat different from those applicable to appeals under Section 402 (b) (2) from orders granting applications, since in the former the issuance of a stay would be a clear usurpation of the administrative functions committed to the Commission. Still other considerations may be pertinent to whether an order appealed under Section 402 (b) (3) could be stayed.

In view of these facts and of the principles heretofore established governing the disposition of certified questions, we submit that the certificate should be dismissed. Cases, *supra*, p. 15. However, in the event that the Court may decide that the question certified should be answered, we shall set forth the reasons why it should be answered in the negative.

II

THE COURT OF APPEALS HAS NO POWER TO STAY ACTION OF THE FEDERAL COMMUNICATIONS COMMISSION PENDING DISPOSITION OF AN APPEAL

A. THE COMMUNICATIONS ACT OF 1934 WITHHOLDS SUCH POWER FROM THE COURT OF APPEALS

Judicial review of action of the Commission is provided for by Section 402 of the Communications Act (Appendix A, *infra*, pp. 40–43). Subsection (b) confers jurisdiction on the Court of Appeals in certain enumerated classes of cases, while all other types of Commission action susceptible of judicial review are by subsection (a) made reviewable in three-judge district courts in accord-

ance with the provisions of the Urgent Deficiencies Act (38 Stat. 219).

Nowhere in the Communications Act is there any provision which confers upon the Court of Appeals the power to stay, during the pendency of an appeal taken under Section 402 (b), the action of the Commission upon which the appeal is predicated. Three-judge courts, on the other hand, are by the provisions of the Urgent Deficiencies Act expressly given the power to issue stay orders and detailed safeguards are established to govern the issuance of such orders (Appendix A, *infra*, pp. 43–44). In view of the fact that these provisions for stay orders are incorporated by reference in Section 402 (a) and in view of the particularity with which the nature and scope of the jurisdiction of the Court of Appeals is defined in Section 402 (b) through (f) (set out in Appendix A, *infra*, pp. 40–43), the failure of Congress to confer on the Court of Appeals power to issue stay orders evinces a deliberate Congressional choice.* This conclusion is reenforced by the legislative history, discussed hereinafter at pages 25–31, and by a consideration of the types of Commission action which are made reviewable in the Court of

*The fact that in Section 405 of the Communications Act (Appendix A, *infra*, p. 43) Congress specified that no application for a rehearing before the Commission should operate to stay or postpone enforcement of the Commission's action "without the special order of the Commission," also tends to show that the omission of a stay provision in Section 402 (b) was deliberate.

Appeals and in three-judge district courts, respectively.

1. *The statutory scheme.*—Section 402 (b) authorizes appeals to the Court of Appeals from decisions of the Commission granting or refusing applications "for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license." By amendment in 1937 (50 Stat. 197) it also authorizes an appeal by "any radio operator whose license has been suspended by the Commission." All other radio matters and all common carrier matters are comprehended by Section 402 (a). See *Federal Communications Commission* v. *Columbia Broadcasting System,* 311 U. S. 132. Thus, so far as radio is concerned, Commission orders granting or denying applications for construction permits, radio station licenses, renewal of licenses, or modification of licenses are appealable to the Court of Appeals. If, however, the order involved is a revocation of a license or a modification of a license on the Commission's own motion, judicial relief must be sought before a three-judge court.[10]

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[10] The reason for conferring jurisdiction on the Court of Appeals in some cases and on three-judge courts in others is explained in the following statement of Senator Dill, the Senate sponsor of the bill which became the Communications Act of 1934:

"I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the

The difference between Commission action which goes to three-judge courts—which are given the power by statute to grant temporary relief—and that which is appealable to the Court of Appeals—which is given no such power—is significant. Cf. *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132, 136. The type of Commission order which is reviewable by three-judge courts is by and large susceptible to being temporarily enjoined while that which the Court of Appeals reviews is in the main not so susceptible. Thus, if the Commission revokes a license, it deprives the licensee of the right conferred by the license to operate transmitting equipment for a designated period on a certain frequency with specified power dur-

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District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which was granted against them or affecting them when they did not bring the case into court * * * So we provide that where the decisions of the commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdiction where the stations are located. But in the case where the applicant for the license or the permit, or whatever it may be, comes to the commission and asks for a change in his license or asks for a new license, or asks for something to be done by the commission, then if the commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." (78 Cong. Rec. pp. 8825–8826.) See also S. Rep. 781, 73d Cong., 2d Sess., pp. 9–10.

ing enumerated hours of the day or night. That is a right of a kind traditionally protected by courts of equity and the administrative action is of a kind traditionally subject to judicial stay. A similar situation exists where the Commission modifies on its own motion an outstanding license.

The situation is entirely different as respects the types of order which may be brought before the Court of Appeals under Section 402 (b) (1) and (2).[11] Here either the judicial power does not embrace stay of the Commission's action at all, or, in the situations where it does, a stay would be manifestly inappropriate. For example, if the Commission denies an application for a construction permit, or license, or modification of license, and the applicant or a person aggrieved appeals, the Court of Appeals cannot stay the Commission's action. For, if it did so it would, in effect, purport to authorize the appellant to construct or operate a station pending determination of the appeal and such an authorization would usurp administrative functions committed

[11] An order appealable under Section 402 (b) (3) (i. e., suspension of a radio operator's license) would appear to be similar to the orders appealable under Section 402 (a) as regards the propriety of a stay power. This circumstance, however, does not detract from our argument with respect to the intention of Congress in enacting the statute in 1934. Subparagraph (3) of Section 402 (b) was added by amendment in 1937. The legislative history of the amendment does not disclose the reason for making orders suspending radio operators' licenses appealable to the Court of Appeals rather than to the three-judge courts.

by the statute to the Commission. The statute authorizes the Commission to grant a permit or license upon finding that a grant will serve public interest, convenience, or necessity. Only the Commission is authorized to make that determination and to issue a permit or license; the power is administrative rather than judicial and it is not entrusted to the courts even on final disposition of an appeal. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144–145. Compare *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, with *Federal Communications Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266. *A fortiori*, the court could not make an interim determination and grant.[12]

On an appeal like that in the instant case brought under Section 402 (b) (2) by a party aggrieved by action of the Commission granting an application, the issuance of an interim stay, it is true, would not involve the exercise of an administrative as distinct from judicial function to the same degree as in the case of an appeal from a denial of an application. But there is an additional reason which may explain why Congress did not empower the court to issue a stay on such

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[12] This would be equally true in a case on appeal from a denial of an application for a renewal of a license. Under the provisions of Sections 301, 307 (d), and 309 (b) (Appendix A, *infra*, pp. 36–38), it is clear that the Communications Act recognizes no putative equity to a renewal of a license. See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475

an appeal. It is found in the nature of the interests which are possessed by the person aggrieved who brings the appeal. These interests are not private rights such as would be protected by a court of equity.

This point can best be illustrated by a consideration of the situation involved in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. There the licensee of an existing station appealed from action of the Commission authorizing the construction of a new station to serve the same community. The appellant urged that the Commission had erred in failing to consider the economic injury which would result to it from the operation of the proposed station. This Court held that such injury gave the appellant standing to appeal under the statute, but did not invalidate the Commission's grant, and that the economic injury which the appellant would suffer need not be considered by the Commission as a separate factor bearing upon whether a grant would be in the public interest. In other words, while financial injury from competition confers standing to appeal, licensees are not entitled to protection from such injury. It is merely the vehicle for getting the licensee into court so that he may "bring to the attention of the appellate court errors of law in the action of the Commission in granting the license." 309 U. S. at 477.

Appellant's position in the instant case is at best no better than that of the licensee in the *Sanders* case. Appellant is the licensee of

a station in Cincinnati, Ohio, and the Commission action complained of shifts a station in Columbus to the frequency on which appellant operates, with the result that there will be some electrical interference with appellant's broadcasting. However, the Commission's action does not infringe the right conferred by appellant's license, namely, that of operating Station WCPO at Cincinnati on 1200 kilocycles with 250 watts power. No right is conferred by the license or statute to serve any particular area. Thus, while the electrical interference suffered by appellant, like the financial injury from competition in the *Sanders* case, possibly gives appellant standing to appeal,[13] no private right is involved and appellant comes into court merely as a sort of King's Proctor to secure correction of asserted errors of law committed by the Commission. Cf. *Colorado Radio Corporation* v. *Federal Communications Commission*, 118 F. (2d) 24, 28 (App. D. C.).

Since persons aggrieved who appeal pursuant to Section 402 (b) (2) do not have any private rights at stake, there is sound policy underlying the omission of Congress to grant to the Court of Appeals the power to issue stays in such cases.[14] It cannot be claimed that the

[13] Whether appellant has standing to appeal is one of the questions raised by the appeal. The court below has postponed decision of this and the other issues raised until after disposition of the petition for a stay order.

[14] Appellant contends (Br. pp. 4 and 5) that the power to issue a stay order is a concomitant to the power contained in

existence of the power should be implied in order to safeguard public rights. By the clear terms of the Act (Sections 307, 309, 319), Congress has committed to the Commission the determination whether public interest, convenience, or necessity would be served by the grant of an application. The Commission must make this determination before making the grant which is appealed from under Section 402 (b) (2). The court is not permitted to substitute its judgment for that of the Commission on this issue even on final judgment. *Supra*, p. 22. To permit it to do so on an interim determination would be inconsistent with the whole scheme of the Act.

The foregoing considerations all point to the fact that there are good reasons behind the withholding of a stay power under Section 402 (b) although such a power is granted under Section 402 (a). The power is properly exercisable in most of the cases covered by Section 402 (a). Under Section 402 (b) such a power would in the main be inappropriate. The failure of Congress to confer the power in Section 402 (b)—(f), therefore, should not be deemed inadvertent.

2. *The legislative history.*—Examination of the legislative history of Section 402 further shows that Congress intended to withhold from the

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Section 402 (e) "to remand the case to the Commission to carry out the judgment of the court." But as shown hereinafter (pp. 33–34), the preservation of the status quo is not necessary for the existence of the power contained in Section 402 (e).

Court of Appeals the power to issue stay orders pending determination of an appeal. In drafting Section 402 Congress had before it and relied extensively on H. R. 7716, 72d Congress,[15] a bill designed to amend the Radio Act of 1927. The bill had been passed in 1933 by both houses but had failed of enactment because of a pocket veto. Section 10 of the bill proposed to amend Section 16 of the Radio Act of 1927 in several important respects. Appeals were to go to the Court of Appeals from orders of the Commission granting or denying an application for a construction permit or a license or for a renewal or modification of a license, and, in addition, from the Commission's action in revoking, suspending, or modifying an existing license. Jurisdiction concurrent with that of the Court of Appeals was vested in the circuit courts of appeals in revocation cases.

Section 16 (f) of the bill, which was applicable both to cases in the Court of Appeals and in the circuit courts of appeals, reads as follows:

> The court may, subject to the foregoing limitation, upon notice to the Commission and to all other parties to the appeal, after hearing, and for good cause shown, enter an order staying action of the Commission under the order appealed from, in whole or in part, upon the giving of a bond by

[15] For example, the statement of the House managers of the bill in the Conference Report on the Communications Act of 1934 (H. Rep. No. 1918, 73d Cong., 2d Sess., pp. 47–49) contains fifteen references to H. R. 7716.

the party applying for the stay in such amount and with such terms and conditions as the Court may deem proper. Pending a hearing upon the application for stay, the Court may enter a temporary stay for a period of not to exceed fifteen days.

The inclusion of these provisions in H. R. 7716 indicates that the failure to include any similar provisions in the Communications Act, except those incorporated in Section 402 (a) by reference to the Urgent Deficiencies Act, was deliberate and that Congress intended to withhold the power to issue stays in cases appealed under Section 402 (b). If Congress had intended the Court of Appeals to exercise such an important power, surely it would not have remained silent when only the year before it had attempted to write into the statute a specific provision conferring that power, with elaborate safeguards governing its exercise. This inference is further strengthened by the fact that in many other statutes establishing a special proceeding for the review of administrative action, Congress has specifically dealt with the matter of stay orders pending determination of the appeal.[16]

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[16] E. g. Securities Act of 1933, 15 U. S. C. § 77 (i); Natural Gas Act, 15 U. S. C. § 717 (r); Bituminous Coal Act of 1937, 15 U. S. C. § 836 (b); Federal Power Act, 16 U. S. C. § 825 (l); Federal Alcohol Administration Act, 27 U. S. C. § 204 (h); Fair Labor Standards Act, 29 U. S. C. § 210 (b); Civil Aeronautics Act of 1938, 49 U. S. C. § 646 (d).

These statutes are of three types. The first kind provides that the taking of an appeal shall operate as a stay unless the

Appellant contends (Br. 11–14) that H. R. 7716 was not designed to confer power on the Court of Appeals to issue stay orders—which power according to appellant the Court already possessed—but rather was intended to condition the exercise of that power by requiring a bond and notice. Appellant cites *General Broadcasting System, Inc.* v. *Bridgeport Broadcasting Station, Inc.*, 53 F. (2d) 664 (D. Conn.), in support of this contention, stating that the inclusion of the stay order provision in H. R. 7716 must be considered in the light of that decision. In the first place, however, it does not appear from the hearings, debates or committee reports on H. R. 7716 that Congress was even aware of the decision in the *General Broadcasting* case. Hence it is difficult to see how that decision could have had any bearing on the objectives of H. R. 7716. In the second place, the holding in the *General Broadcasting* case was that under Section 16 of the Radio Act of 1927 the Court of Appeals had no stay order power. Whether it had such power under the 1930 amendment was

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court otherwise directs (e. g. Federal Alcohol Administration Act, 27 U. S. C. § 204 (h)); the second type specifically authorizes the court to issue stay orders (e. g. Civil Aeronautics Act of 1938, 49 U. S. C. § 646 (d); the third type provides that the taking of an appeal shall not operate as a stay unless specifically authorized by the Court (e. g. Natural Gas Act, 15 U. S. C. § 717 (r)). See also National Labor Relations Act, 29 U. S. C. § 160 (e) and (f), authorizing the court to grant temporary relief or restraining orders on application of the Board.

expressly left open. The *General Broadcasting* case is, therefore, clearly inapplicable.

Appellant also refers to a colloquy between Congressman Linthicum and Congressman Davis, who was chairman of the House Committee in charge of the bill. The colloquy is as follows (75 Cong. Rec. 3682):

> Mr. LINTHICUM. Should there not be some provision by which a station could give bond and then appeal, to determine this question (of suspension)? When they are once suspended that practically ruins the station forever. It seems to me if there was some provision by which they could give bond until they had a hearing upon the appeal, it would be better.
>
> Mr. DAVIS. Well, they may now, under certain conditions, but even after this bill is enacted they may, which, however, is within the discretion of the court to which the case is appealed.
>
> Mr. LINTHICUM. If a station is suspended for a couple of weeks, it is very difficult for it to take its position again.
>
> Mr. DAVIS. Well, it is not nearly as difficult as it would be if the commission revoked their license, which they now have the right to do.

While the quoted passage is far from clear, it is safe to say that neither Congressman conceived the function of Section 16 (f) to be to condition an already existing power of the Court of Appeals. It appears from the passage quoted that Section 16 (f) was proposed in order to

extend protection to existing licensees by providing for a court order to assure them the right to stay on the air pending appeal from a Commission order suspending or revoking their license. This concern for such protection to licensees would be meaningless if—on appellant's assumption—the Court already possessed such power. The requirement of a bond and notice would not be needed for the protection of existing licensees but rather for the protection of the public.

The reason why Congress gave the Court of Appeals a stay order power under H. R. 7716 and withheld it in the Communications Act appears to be quite clear from what already has been said. Under Section 10 of H. R. 7716 the Court of Appeals was to have jurisdiction to review revocations and suspensions of licenses in addition to grants and denials of applications. As has been indicated (*supra*, pp. 20–21), a stay order power may be appropriate in revocation and suspension cases, but not in cases involving the grant or denial of applications. Thus when Congress in the Communications Act made a bipartite division of review of radio matters, it conferred a stay order power in the revocation and suspension cases, which were made appealable to three-judge courts, but did not do so in the cases which were made reviewable in the Court of Appeals.

Appellant also contends (Br. 6–8) that the Court of Appeals issued stay orders under the

Radio Act of 1927 and, until recently, under the Communications Act without objection by the Commission, and that the re-enactment of Section 16 of the Radio Act as Section 402 (b) of the Communications Act without any substantial change indicates that Congress approved the view of the Court of Appeals that it had power to issue such orders.

However, prior to 1930 the power exercised by the Court of Appeals under Section 16 of the Radio Act was administrative and not judicial; the Court of Appeals under that section was a superior revising agency. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. Section 402 did not reenact the original Section 16 but rather Section 16 as amended in 1930 to remove all administrative functions from the Court of Appeals. Hence the issuance of stays by that court under the original Section 16 is irrelevant.[17]

Of the cases decided between 1930 and the enactment of the Communications Act of 1934 not one contains a discussion of the power to issue stay orders. As a matter of fact we have been able to find but one case (*Boston Broadcasting Co.* v. *Federal Radio Commission*, 67 F. (2d) 505 (App. D. C.)) where the granting of a stay order is referred to at all. Even in this case, no dis-

[17] The references to stay orders contained in the Federal Radio Commission's Third and Fourth Annual Reports, cited by appellant (Br. 7), are to orders which were issued under Section 16 before its amendment.

cussion of the problem is made nor does the opinion purport to construe the language of Section 16 as amended. The Court merely refers to the stay order in the last paragraph of the opinion in an indirect manner by declaring that "the stay order entered in this appeal is dissolved" (p. 507).

No such oblique reference in a solitary opinion can possibly be held to constitute a settled construction by the Court of Appeals of the pertinent provisions of Section 16 as amended.[18] There is, therefore, no basis for any presumption that Congress approved the construction urged by appellant. Cf. *United States* v. *Raynor*, 302 U. S. 540.

B. NO OTHER STATUTE CONFERS UPON THE COURT OF APPEALS THE POWER TO ISSUE THE STAY ORDER REQUESTED

Appellant apparently contends (Br. 14–15) that Section 262 of the Judicial Code and Section 33 of Title 18 of the District of Columbia Code (Title 11—208, 1940 ed.) give the Court of Appeals power to issue the stay order requested.

Section 262 of the Judicial Code provides:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts

[18] Cases since 1934 in which the Court of Appeals has issued stay orders have no bearing on the presumption of congressional approval of a settled construction of the statute. The provisions of Section 402 (b) have not been re-enacted since 1934.

> shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 33 of Title 18 of the District of Columbia Code (31 Stat. 1227) provides:

> The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction.

In view of the specific congressional intention reflected in the Communications Act to withhold from the Court of Appeals any power to stay Commission action pending appeal, these general statutes could not in any event be given the effect urged by appellant. But even apart from this specific Congressional disposition of the issue, it is not thought that these "all writs" statutes empower the Court of Appeals to stay Commission action. These statutes, if applicable at all to appeals from the Communications Commission, must be read in the light of the nature of the reviewing functions of the Court of Appeals. As was pointed out by this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, the relationship between the Court of Appeals and the Commission is not that of federal courts *inter se*. The function of the Court of Appeals is limited to the laying bare of any errors of law committed by the Commission. And, as applied to proceed-

ings to review Commission action, the "all writs" statutes would give the Court of Appeals the power to issue only such writs as might be necessary to protect the jurisdiction of the Court to carry out its function of determining whether the Commission has committed errors of law.

Appellant does not suggest how this jurisdiction would be interfered with if during the pendency of an appeal the changes authorized by a construction permit issued by the Commission were to be effected. As a matter of fact, in the instant case, the changes have already been made and for many months WCOL, Inc., has been operating on 1200 kilocycles and with the increased power authorized by the Commission (Appendix C, *infra*, pp. 58–59). It can hardly be suggested that as a result the appeal to the court below is now meaningless. That court can fully exercise its jurisdiction to review the Commission's action in granting the application of WCOL, Inc., whether or not the action of the Commission is stayed in the interim. If on final judgment an error of law is found, the Commission must revise its action in accordance with the decision of the court.

The case of *Omaha & Council Bluffs Street Railway Co.* v. *Interstate Commerce Commission*, 222 U. S. 582 (see also 230 U. S. 324) cited by appellant on page 15 of its brief is not in point. This Court there suspended the enforcement of a rate order of the Interstate Commerce Commission pending appeal from the Commerce Court, and it did so

relying upon Section 716 of the Revised Statutes, which became Section 262 of the Judicial Code, quoted *supra*, pp. 32–33. However, in that case the statute creating the Commerce Court expressly authorized it to stay the Interstate Commerce Commission's action (36 Stat. 542–543), and there was no reason to suppose that Congress intended to deny such power to this Court. Indeed, Section 2 of the same statute provided that this Court might stay the judgment of the Commerce Court upon the appellant's giving of a bond (36 Stat. 542).

CONCLUSION

The certificate should be dismissed on the ground that the question certified is of objectionable generality. If the question is answered, however, it should be answered "No."

Respectfully submitted.

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APPENDIX A

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475, and by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C., Sec. 151 *et seq.*:

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * * * *

SECTION 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power

among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

* * * * *

SECTION 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto,

it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject;

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * *

SECTION 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability

of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or

first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * * *

SECTION 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by

any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise

delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an

appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

SECTION 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided however,* * * * No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. * * *

Urgent Deficiencies Act of 1913, c. 32, 38 Stat. 208, 220:

* * * * * *

* * * No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call, to his assistance to

hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. * * *

Judicial Code:

SECTION 239. [28 U. S. C., Sec. 346.] In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and there-

upon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by appeal.

SECTION 240. [28 U. S. C., Sec. 347.] (a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal.

(b) Any ~~case in a circuit~~ court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the United States

Court of Appeals for the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

* * * * * *

SECTION 262. [28 U. S. C., Sec. 377.] The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

District of Columbia Code, title 18, sec. 33, appearing in the 1940 edition as Title 11—208:

The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction.

APPENDIX B

40086

PUBLIC NOTICE
April 2, 1940.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D. C.

In re WCOL, INC., COLUMBUS, OHIO. For Construction Permit. File No. B2-P-2508

DECISION AND ORDER ON PETITION FOR REHEARING

On October 10, 1939, the Commission granted without hearing the application of WCOL, Inc., Columbus, Ohio, for construction permit to use the frequency 1200 kc and increase power from 100 watts to 250 watts, unlimited time. WCOL now operates on 1210 kc, with 100 watts power, unlimited time.

On October 30, 1939, the Scripps-Howard Radio, Inc., licensee of Station WCPO, filed a petition for hearing or rehearing requesting the Commission to set aside its action of October 10, 1939 and designate the application of Station WCOL for hearing.

Operating on the frequency 1210 kc in the State of Ohio at the present time in addition to Station WCOL are WHIZ, Zanesville, 53 miles from Columbus, using 100 watts power, unlimited time; WLOK, Lima, 79 miles from Columbus, using 100 watts power daytime only; and WJW, Akron, 109 miles from Columbus, with 250 watts power, unlimited time. Concurrently with its grant of the

WCOL application the Commission granted WHIZ authority to increase power to 250 watts, contingent upon the change of frequency of WCOL to 1200 kc. Station WLOK has an application pending to increase power to 250 watts and operate unlimited time.

Already assigned to the frequency 1200 kc in the State of Ohio are Stations WTOL, Toledo, Ohio, 120 miles from Columbus, recently granted an increase in power to 250 watts, unlimited time; WHBC, Canton, Ohio, 102 miles from Columbus, using 250 watts power, unlimited time, and WCPO, Cincinnati, 100 miles from Columbus, using 250 watts, unlimited time.

The petition alleges, among other things, that at the present time the closest nighttime station to WCPO on the 1200 kilocycle frequency is 155 miles away and uses 100 watts power; that the action of the Commission with regard to WCOL authorizes the use of 250 watts power by a station 98 miles away; that the required separation to preserve the service area of WCPO is in excess of 244 miles for operation by the interfering station using power of 100 watts and this would be substantially greater with a power of 250 watts; and that the operation of WCOL during evening hours as authorized by the Commission will, therefore, result in real, substantial, and destructive interference throughout a large portion of the present coverage area of Station WCPO and in all directions from its transmitter; that (upon information and belief) "according to standards for the measurement of interference during daytime hours as promulgated by the Commission, the operation of WCOL as proposed will result in destructive interference over

a substantial portion of the coverage area of WCPO, particularly in the direction of Columbus and the present coverage area through which such destructive interference will take place will be more than 500 square miles with the complete loss of WCPO's listening audience in that area"; that by reason of the interference above described, petitioner will be deprived of revenues, its competitive position impaired and the area from which it may draw program talent and program material materially reduced; that Station WCPO will be placed in a position where during evening hours it will not adequately cover the metropolitan district of Cincinnati; that the action of the Commission in granting the application of WCOL adversely affects it without notice or hearing and without any advice to it as to the contentions of WCOL, and the comparative claims of WCOL to the enlargement of its coverage at the expense of the listening audience of WCPO.

Station WCPO, operating on 1200 kc, is classified by the Commission as a local or Class IV station. The Commission's Standards of Good Engineering practice concerning Standard Broadcast Stations contemplate that the nighttime service area of a Class IV station extends to the 4 mv/m ground wave contour (which contour in this case will not extend beyond a few miles from the transmitter of WCPO), and to the 0.5 mv/m ground wave contour during daytime hours (which contour will extend approximately 27 miles from the transmitter). On such local channels the separation between stations operating on the same frequency which will ordinarily be required is the distance necessary in order to permit satisfactory

daytime service to be rendered. This is due to the fact that the phenomena of skywave transmission are such that the interference at night from a station occurs with maximum intensity at distances of 200 to 400 miles from the transmitter, and a much lesser amount of interference will result at shorter distances. With WCOL operating as at present or as proposed, the skywave interference which would be expected to delineate the extent of the interference-free service of WCPO at night originates with stations at considerably greater distances from Cincinnati than Columbus, and, therefore, the operation of WCOL as proposed will not result in any appreciable increase in the interference to WCPO at night.

Station WCPO renders an intermittent service beyond its 4 mv/m contour at night and its 0.5 mv/m contour during the day. At night, some interference may result to the intermittent service area of WCPO. During the daytime, interference will occur to the intermittent service of Station WCPO, and some interference as hereinafter set forth, will occur also within its primary service area, as a result of the operation of WCOL as proposed. Under the Commission's standards, interference in the intermittent service area of a Class IV station caused by the operation of a proposed station does not necessarily preclude the establishment of such proposed station. One of the requisites to a determination that the establishment of a proposed station causing such interference is not in the public interest, convenience or necessity is a showing that 90% of the population to which the existing station renders such intermittent service does not receive primary service

from any other station rendering the same general program service. Such a state of facts is not present in this case. The records of the Commission indicate that the area wherein WCPO renders intermittent service already receives primary service from Stations WLW, WCKY, WKRC, and WSAI. Petitioner's contentions that "the operation of WCOL during evening hours as authorized by the Commission will * * * result in real, substantial and destructive interference throughout a large portion of the present coverage area of Station WCPO and in all directions from its transmitter"; that "Station WCPO will be placed in a position where during evening hours it will not adequately cover the metropolitan district of Cincinnati", and that "the operation of WCOL as proposed will result in destructive interference over a substantial portion of the coverage area of WCPO, particularly in the direction of Columbus, and the present coverage area through which such destructive interference will take place will be more than 500 square miles with the complete loss of WCPO's listening audience in that area" are without merit.

Petitioner's allegations that the grant of increased power to WCOL adversely affects its interests on an economic basis and that because of a reduction in its service area there will be a reduction in the area from which it may draw talent and program material are mere conclusions which are unsupported by any allegation of facts from which such conclusions might reasonably be drawn. It does not follow from the fact petitioner's service area will be somewhat restricted that the increase in power to WCOL would result in such a

diminution of petitioner's revenues as to seriously impair or destroy its ability to continue operation of Station WCPO in the public interest. Nor does it follow from this fact that its ability to procure talent and program material will be affected. The restriction of its present service area does not preclude petitioner from drawing its talent and program material from the same sources as heretofore.

As to petitioner's contention that it is adversely affected "without any notice to it or hearing and without any advice to it as to the contentions of WCOL, the comparative claims of WCOL to the enlargement of its coverage at the expense of the listening audience of WCPO, and other material factors affecting the public interest and WCPO", the Communications Act of 1934 requires the Commission to give notice and an opportunity to be heard only to an applicant prior to denial of his application. There is no requirement in the Act for notice and an opportunity to be heard to others before the Commission may grant an application for construction permit. If the Commission can determine after an examination of an application and all other relevant data that a grant thereof would serve public interest, convenience, and necessity, it is its duty under the Act to grant the application. (Section 309 (a)). In the instant case, the Commission was able to determine from its examination of the WCOL application that the granting thereof would serve public interest, convenience, and necessity, and it, therefore, complied with its statutory duty in granting the same.

Petitioner insists, however, that the grant constitutes a modification or revocation in part of its license because part of the area in which it now

renders service will be curtailed, and that the Commission has no power to do this without giving it notice in writing of such proposed action and the grounds or reasons therefor, together with a reasonable opportunity to show cause why such an order of modification or revocation should not issue. Petitioner's contention appears to be based upon a claim that the Act or its license confers upon it a right to serve a particular number of listeners within a specified geographical area. The Act is devoid of any suggestion of such a right, and the petitioner's license contains no provision expressly or impliedly authorizing petitioner to serve any particular portion of the listening public. The petitioner's license merely authorizes it to operate transmitting equipment on a specified frequency, power and hours of operation. Consequently, it can hardly be successfully contended that the grant of an application the effect of which may be a restriction of petitioner's service area constitutes a modification or partial revocation of petitioner's license. Furthermore, petitioner can hardly contend that it has not been given an opportunity to show cause why such action should not be taken. It had notice of the Commission's action and has, by filing a petition for rehearing, attempted to show why the Commission's order should not become effective.[1] The allegations made in such petition fail to show that the grant of the WCOL application will not serve public interest, convenience or necessity and consequently no cause

[1] The Commission on October 24, 1939, upon petitioner's motion, stayed the issuance of construction permit to WCOL pending determination of this petition for hearing or rehearing.

has been shown why the application should not be granted.

On December 22, 1939, WCOL, Inc., Columbus, Ohio, filed its opposition to the petition of Scripps-Howard Radio, Inc. (WCPO) for hearing or rehearing. Attached to the applicant's opposition is a verified report of a study of interference arising out of the operation of WCOL on the frequency 1200 kilocycles, which has been prepared by the applicant's engineers and filed with the application of WCOL.

Scripps-Howard Radio, Inc., has filed a motion to strike the "study of interference conditions caused by the operation of WCOL on 1200 kilocycles at Columbus, Ohio, December 1939", the basis for which is its contention that the study contained detailed expert opinion and a substantial amount of factual data concerning which WCPO has no information, and the accuracy of which has not been tested by cross examination. The factual data submitted by WCOL are under oath and are attached to its application as a part thereof. The mere fact that it was submitted after the application was filed is immaterial. The Commission may consider it just as though such data were filed simultaneously with the application, or submitted as a written statement of fact under a request of the Commission made pursuant to Section 308 (b) of the Act. In either event, the Commission may consider such information in determining whether the application should be granted or denied, and is under no legal duty to submit the same to the petitioner for cross examination. It should be noted, however, that the opposition with supporting data was served on petitioner, who had an opportunity to submit to the Commis-

sion any information it might have to refute any statement, factual or otherwise, made by the applicant. No such information has been filed with the Commission to date, nor are any facts alleged in the petitioner's motion to strike refuting the factual data submitted by WCOL or questioning the accuracy of such facts. Petitioner has made no request of the Commission for additional time within which to make its own study or submit any factual data in opposition to that submitted by the applicant. Our own study of the data submitted by the applicant indicates that it is substantially correct. Therefore, the motion to strike will not be granted.

In so far as the primary service area of Station WCPO is concerned, appears from the data available to the Commission that WCPO now serves approximately 822,400 persons within its 0.5 millivolt per meter contour. Approximately 20,800 of such persons reside in the area within the contour where interference would be caused by WCOL if operating on this frequency, reducing the number of persons to be served by WCPO to 801,600; that the operation of WCOL as proposed will not interfere with the service of WCPO inside the Cincinnati metropolitan area as defined by the United States Bureau of Census; that, operating as proposed on the frequency 1200 kc the nearest station to WCOL on the same frequency will be approximately 100 miles away instead of 50 as at present, and the interference-free service area of Station WCOL will be extended so as to include 398,500 persons instead of 340,700 as at present, representing an increase of 57,800 persons; that Station WLOK, at Lima, now serves 99,300 persons and, if WCOL were removed from 1210 and permitted to operate on 1200 kilocycles, with 250 watts power, WLOK would

then be able to serve 129,900 persons, or a gain of 30,600 persons. WLOK is the only broadcast station in Lima. Lima has a population of 42,287. It is located in Allen County, which has a population of 69,419, and the nearest station to Lima is located at Fort Wayne, Indiana, 60 miles distant; that the transfer of WCOL from 1210 kilocycles to 1200 would permit the conditional grant of increased power to WHIZ to become effective, thereby improving the service in the Zanesville community as follows: Whereas WHIZ now serves 54,300 persons, it would be able to serve 112,300, a gain of 58,000 persons. WHIZ is the only station in Zanesville, the nearest other stations being located at Columbus; that, in summary, the result of the operation of WCOL as proposed would be an increase of 146,400 persons within the interference-free primary service areas of WCOL, WLOK, and WHIZ, as compared to a loss of 20,800 persons now receiving primary service from Station WCPO.

Thus, upon a comparison of the benefits and detriments sustained in the respective communities, public interest, convenience or necessity will be served by the grant of the application. The Commission has before it all information necessary to a determination of the questions raised by the application of WCOL, Inc. The Petition for Hearing or Rehearing filed by Scripps-Howard Radio, Inc. (WCPO), raises no valid objections which would require us to set aside our grant of the above-entitled application. Accordingly, IT IS ORDERED, this 29th day of March, 1940, that the Petition for Hearing or Rehearing BE, AND IT IS HEREBY, DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary.*

APPENDIX C

42291

July 24, 1940

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C.

In re: WCOL, INC., COLUMBUS, OHIO. For License. File No. B2–L–1154

DECISION AND ORDER ON PETITION FOR HEARING OR REHEARING

On October 10, 1939, the Commission granted the application of WCOL, Inc., Columbus, Ohio, for construction permit to use the frequency 1200 kilocycles with 250 watts power, unlimited time.

On October 30, 1939, Scripps-Howard Radio, Inc., licensee of Radio Station WCPO, Cincinnati, Ohio, filed a petition for hearing or rehearing requesting the Commission to set aside its order of October 10, 1939, granting the application of WCOL for construction permit and to designate said application for hearing. On March 29, 1940, the Commission made its decision and order denying the petition for hearing or rehearing filed by Scripps-Howard Radio, Inc.

On April 14, 1940, Scripps-Howard Radio, Inc., (WCPO) filed its notice of appeal in the United States Court of Appeals for the District of Columbia from the decision of the Commission granting the application of WCOL and requested an order staying the effectiveness of said decision and order pending the termination of the appeal. No action

was taken by the Court on the request for a stay order and the construction permit authorized on October 10, 1939, was mailed the applicant, which completed the construction thereunder and made the required program tests. Thereafter, it made application for a license to cover construction permit.

On May 21, 1940, Petitioner filed in the United States Court of Appeals for the District of Columbia a petition to enlarge the terms of the stay order theretofore requested so as to prevent issuance of the license following construction permit. No action was taken by the Court on this petition.

On June 3, 1940, WCOL, Inc., having made satisfactory proof to the Commission that all the terms, conditions, and obligations set forth in the application and permit were fully met, and there being no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the construction permit which would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission granted its application for license to cover the construction permit pursuant to Section 319 (b) of the Communications Act of 1934.

On June 22, 1940, Scripps-Howard Radio, Inc., (WCPO) filed a petition for hearing or rehearing directed against the issuance of the license to WCOL to cover construction permit in which it is alleged the operation of Station WCOL as authorized by said license "produced interference with the established service of petitioner in accordance with the predictions and computations heretofore set out" (in its petition for hearing or rehearing filed with the Commission, directed against the

grant of October 10, 1939, of the WCOL application for construction permit); and that "such operation during daytime hours produces regular interference in that part of the established and lawful service area of the petitioner in the direction of Columbus, Ohio, beginning at about three miles beyond Montgomery, Ohio, at the 1140 microvolt per meter contour of the petitioner, which interference becomes increasingly severe with the further approach toward the 500 microvolt per meter contour of the petitioner in the direction of Columbus."

In the Commission's decision of March 29, 1940, on the Scripps-Howard Radio, Inc., petition for hearing or rehearing which was directed against the order granting the application of WCOL for construction permit to use the frequency 1200 kilocycles with 250 watts power, unlimited time, the Commission pointed out that the petition failed to show any facts indicating that the grant of the WCOL application would not serve public interest, convenience and necessity; that, on the contrary, the information before the Commission indicated that WCPO, operating on the frequency 1200 kilocycles with 250 watts power, unlimited time, serves approximately 822,400 persons within its 0.5 millivolt per meter contour; that approximately 20,800 of such persons reside in the area within the contour where interference would be cause to the operation of WCPO of WCOL operating on this frequency; that the result of the operation of WCOL as proposed would be an increase of 146,400 persons within the interference-free primary service area of Stations WCOL, WLOK, and WHIZ as compared with a loss of 20,800 persons

now receiving primary service from WCPO; and that, therefore, the proposed interference with WCPO did not constitute a ground upon which the Commission could conclude that public interest, convenience or necessity would not be served by a grant of the WCOL application.

The instant petition for hearing or rehearing which is directed against the issuance of the license to WCOL to cover construction permit merely suggests that operation by WCOL under the grant results in interference in petitioner's present service area, but sets forth no facts in any way indicating that the Commission erred in concluding that "upon a comparison of the benefits and detriments sustained in the respective communities, public interest, convenience and necessity will be served by the grant of the application." Furthermore, no facts are set forth in the petition upon which the Commission could find that the terms, conditions and obligations set forth in the application and permit of WCOL have not been met, nor has the petitioner brought to the Commission's attention any cause or circumstance, arising since the granting of the WCOL construction permit, which would make the operation of such station against the public interest, convenience or necessity.

Accordingly, IT IS ORDERED, this *19th* day of *July, 1940*, that the petition for hearing or rehearing filed by Scripps-Howard Radio, Inc., (WCPO), BE, AND IT IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary*.

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SUPREME COURT OF THE UNITED STATES.

No. 508.—October Term, 1941.

Scripps-Howard Radio, Inc., vs. Federal Communications Commission. } On Certificate from the United States Court of Appeals for the District of Columbia.

[April 6, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here on certificate from the Court of Appeals for the District of Columbia. Judicial Code § 239, 28 U. S. C. § 346. The question certified relates to the power of the Court of Appeals to stay the enforcement of an order of the Federal Communications Commission pending determination of an appeal taken under § 402(b) of the Communications Act of 1934, 48 Stat. 1064, 1093.

The circumstances which induced the Court to certify the question are these: On October 10, 1939, the Commission granted without hearing the application of WCOL, Inc., licensee of Station WCOL, Columbus, Ohio, for a construction permit to change its frequency from 1210 to 1200 kilocycles and to increase its power from 100 to 250 watts. The appellant, Scripps-Howard Radio, Inc., which is the licensee of Station WCPO, Cincinnati, Ohio, operating on a frequency of 1200 kilocycles with power of 250 watts, filed a petition for "hearing or rehearing" requesting the Commission to vacate its previous order and set the WCOL application for hearing. The Commission denied this petition on March 29, 1940, and an appeal followed. In its statement of "reasons for appeal", the appellant claimed that the Commission could not lawfully grant the WCOL application without hearing; that in granting the application the Commission departed from its rules and standards of good engineering practice; that the appellant was entitled to a hearing in order to show that the Commission's action did not serve the public interest since it would result in materially reducing the coverage of Station WCPO and thereby deprive a substantial number of listeners of "the only local regional non-network service" available to them; and that in granting the WCOL

application without hearing, the Commission violated the Due Process Clause of the Fifth Amendment.

The appellant asked the Court of Appeals to stay the Commission's order pending the disposition of its appeal. Even though the Court "had consistently over a long period of years, and without objection on the part of the Commission, issued stay orders" in cases where such orders were found to be necessary, the Commission opposed the issuance of a stay order in this case on the ground that the Court was without power to grant a stay. The application was heard before the Court sitting with three judges, which, with one judge dissenting, upheld the Commission's contention. A motion for rehearing before all six members of the Court was granted. The judges being equally divided on the question of the Court's power to grant a stay, the following question was certified to us:

"Where, pursuant to the provisions of Section 402(b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?"

The Commission suggests that the certificate should be dismissed because of the generality of the question. *Lowden* v. *Northwestern Nat. Bank*, 298 U. S. 160. Read in the light of the preliminary statement certifying the facts which presented the question, *Hill* v. *Wampler*, 298 U. S. 460, 464, the question is limited to the type of order made by the Commission in this case. It is therefore sufficiently specific.

The Communications Act of 1934 is a hybrid. By that Act Congress established a comprehensive system for the regulation of communication by wire and radio. To secure effective execution of its policy of making available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges", Congress created a new agency, the Federal Communications Commission, to which it entrusted authority previously exercised by several other agencies. Under the Radio Act of 1927, 44 Stat. 1162, the Federal Radio Commission had broad powers over the licensing and regulation of radio facilities. The Mann-Elkins Act of 1910, 36 Stat. 539, gave the Interstate Commerce Commission general regulatory authority over

telephone and telegraph carriers. In addition, the Postmaster General was empowered, under the Post Roads Act of 1866, 14 Stat. 221, to fix rates on government telegrams.[1] The Communications Act of 1934 was designed to centralize this scattered regulatory authority in one agency. See Message from the President to Congress, February 26, 1934, Sen. Doc. No. 144, 73d Cong., 2d Sess.; Sen. Rep. No. 781, 73d Cong., 2d Sess., p. 1; H. Rep. No. 1850, 73d Cong., 2d Sess., pp. 3-4.

The provisions for judicial review in the Act of 1934 reflect its mixed origins. Section 402(a) makes the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, pertaining to judicial review of orders of the Interstate Commerce Commission, applicable to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license)". 48 Stat. 1064, 1093. The Urgent Deficiencies Act, which is thus incorporated in § 402(a) of the Communications Act of 1934, provides for review in a specially constituted district court, with direct appeal to this Court. That Act authorizes the district court, in cases "where irreparable damage would otherwise ensue to the petitioner", to allow a temporary stay of the order under review, subject to specified safeguards. 38 Stat. 208, 220.

Section 402(b) of the Communications Act of 1934 provides for review of the orders excepted from § 402(a). It gives an appeal "from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases: (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. (2) By any other person aggrieved or whose interests are adversely affected by any

[1] A summary of the authority vested in the Federal Radio Commission, the Interstate Commerce Commission, and the Postmaster General, and of the extent to which such authority was actually exercised, is contained in Appendix A, Historical Background of the Communications Act of 1934, of the Monograph of the Attorney General's Committee on Administrative Procedure dealing with the Federal Communications Commission, Sen. Doc. No. 186, 76th Cong., 3d Sess., pt. 3; see also Herring and Gross, Telecommunications, pp. 210-45.

decision of the Commission granting or refusing such application." 48 Stat. 1064, 1093. This section follows § 16 of the Radio Act of 1927, 44 Stat. 1162, as amended in 1930, 46 Stat. 844, the relevant portions of which are set forth in the margin.[2] See Sen. Rep. No. 781, 73d Cong., 2d Sess., p. 9; H. Report No. 1918, 73d Cong., 2d Sess., pp. 49-50; remarks of Senator Dill, in charge of the measure in the Senate, 78 Cong. Rec. 8825, and of Representative Rayburn, who occupied the same role in the House, 78 Cong. Rec. 10314.

Thus, in both the Radio Act of 1927 and the Communications Act of 1934, orders granting or denying applications for construction permits or station licenses and for renewal or modification of licenses were made reviewable by the Court of Appeals for the District of Columbia.[3] And with respect to such appeals, both § 16 of the Radio Act and § 402(b) of the Communications Act were silent with respect to the power of the Court of Appeals to stay orders pending appeal. It is upon this silence in the Communications Act that the Commission bases its contention, made for the first time when this litigation arose in 1940, that the Court is without such power.

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[2] "Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license, whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia. . . ." 44 Stat. 1162, 1169.

[3] Where the Commission revokes a station license or modifies a license on its own motion, judicial review is available only under § 402(a) of the Communications Act. The reason for this differentiation appears in the following statement of Senator Dill, who steered the bill in the Senate:

"I desire to call attention to what I think is an important fact to consider in this appeal provision. Those owners of radio broadcasting stations living long distances from the District of Columbia should not be required to come to Washington to prosecute an appeal from a decision for which they were not responsible. When I say 'were not responsible' I mean a decision which was granted against them or affecting them when they did not bring the case into court. . . . So we provide that where the decisions of the commission are made in cases wherein the stations took no part in beginning the suits, appeal may be taken in the three-judge district courts in the jurisdictions where the stations are located. But in the case where the applicant for the license or the permit, or whatever it may be, comes to the commission and asks for a change in his license or asks for a new license, or asks for something to be done by the commission, then if the commission makes a decision from which he desires to appeal he must make his appeal in the courts of the District of Columbia." 78 Cong. Rec. 8825-26. Cf. Sen. Rep. No. 781, 73d Cong., 2d Sess., pp. 9-10.

Section 16 of the Radio Act of 1927 provided for appeals from revocation orders to either the Court of Appeals for the District of Columbia or the District Court of the district in which the station was located. 44 Stat. 1162, 1169.

No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that, as part of its traditional equipment for the administration of justice,[4] a federal court can stay the enforcement of a judgment pending the outcome of an appeal. *In re Claasen*, 140 U. S. 200; *In re McKenzie*, 180 U. S. 536.

Generally speaking, judicial review of administrative orders is limited to determining whether errors of law have been committed. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139-40. Because of historical differences in the relationship between administrative bodies and reviewing courts and that between lower and upper courts, a court of review exhausts its power when it lays bare a misconception of law and compels correction. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144-45. If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made. The existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review. "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case." *Virginian Ry.* v. *United States*, 272 U. S. 658, 672-73; see *Warehouse Co.* v. *United States*, 283 U. S. 501, 513-14.

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[4] Section 262 of the Judicial Code, 28 U. S. C. § 377, empowers the federal courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This provision appeared in the very first Judiciary Act, 1 Stat. 73, 81-82. Compare District of Columbia Code (1940 ed.) Title 11-208, authorizing the Court of Appeals for the District of Columbia "to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction." 31 Stat. 1189, 1227.

These controlling considerations compel the assumption that Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review. It is urged that such a manifestation appears in the provisions for judicial review contained in the Communications Act of 1934. Specifically, the Commission contends that since § 402(a) incorporates the provisions of the Urgent Deficiencies Act of 1913 which explicitly authorize and regulate the issuance of stay orders, the omission of any reference in § 402(b) to a power to stay orders under review reflects a deliberate Congressional choice to deprive the Court of Appeals of this power.

The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts. The Commission argues that the silence of Congress, in view of the legislative history of the Act and the nature of the orders reviewable under the Act, qualifies this general authority and is as commanding as if Congress had expressly withheld from the Court of Appeals the power to stay orders appealed under § 402(b).

The legislative history can furnish no support for this contention. Neither the committee reports nor the hearings nor the debates contain any reference to the power to stay Commission orders on appeal. Significance is found in H. R. 7716, 72d Congress, a bill which was passed by both houses in 1933 but which failed of enactment because of a pocket veto. That bill proposed to amend § 16 of the Radio Act of 1927 so as to vest concurrent jurisdiction (with the Court of Appeals for the District of Columbia) of revocation cases in the circuit courts of appeals, rather than in the district courts. The bill also provided that the reviewing court, whether a circuit court of appeals or the Court of Appeals for the District of Columbia, could enter a stay order "upon the giving of a bond by the party applying for the stay in such amount and with such terms and conditions" as the court deemed proper.

It is suggested that if Congress had intended in the Act of 1934 to authorize the Court of Appeals to issue stay orders in appeals

under §402(b), it would not have remained silent when only the year before it had attempted to enact into law a specific provision conferring that power. But H. R. 7716 and the Communications Act of 1934 were not parallel legislative proposals. The former was not a comprehensive legislative scheme for the unification of federal regulatory authority over communications. It proposed merely to amend the Radio Act of 1927 in several minor particulars. See H. Rep. No. 221, 72d Cong., 1st Sess., p. 7; Sen. Rep. No. 564, 72d Cong., 1st Sess., p. 7; Sen. Rep. No. 1004, 72d Cong., 2d Sess., p. 9. The enactment of the Communications Act of 1934, however, came after a message to Congress from the President on February 26, 1934, recommending the creation of a single authority over communication by wire and radio. Sen. Doc. No. 144, 73d Cong., 2d Sess. Earlier in 1934 an interdepartmental committee had made a study of the entire communications situation. Extensive public hearings on the question of regulating the whole field of communications were held by both the Senate and House Committees on Interstate Commerce. It is obvious, therefore, that what Congress undertook to do by the Communications Act of 1934 was entirely different from what it tried to do the previous year in H. R. 7716.

We are told that in drafting §402 Congress had before it and relied extensively upon H. R. 7716, and reference is made to the citations to that bill in the statement of the House managers. H. Rep. No. 1918, 73d Cong., 2d Sess., pp. 47-49. But whatever reliance was placed upon H. R. 7716 by the framers of the 1934 legislation was without relation to its provisions for judicial review. For in that same statement (p. 47) it is said that the "provisions of the Radio Act of 1927 relating to judicial review have been included" in the bill. And, as has previously been noted, even though the Radio Act of 1927 contained no provisions dealing with the authority of the Court of Appeals for the District of Columbia to stay orders of the Commission on appeal, the Court had been issuing stays as a matter of course wherever they were found to be appropriate, without objection by the Commission. *Boston Broadcasting Co.* v. *Federal Radio Commission*, 67 F. 2d 505, decided June 19, 1933.

It is indisputable that, at least since 1930, the Court of Appeals has been staying orders both of the Federal Radio Commission, under § 16 of the Radio Act of 1927, and of the Federal Communications Commission, under § 402(b) of the Communications Act of

1934, whenever stays were regarded as necessary. To be sure, in only one case, the *Boston Broadcasting* decision, *supra*, did the Court of Appeals even refer to the granting of a stay order. The explanation is not hard to find. The power to stay was so firmly imbedded in our judicial system, so consonant with the historic procedures of federal appellate courts, that there was no necessity for the Court of Appeals to justify its settled practice.[5]

The considerations of policy which are invoked are as fragile as the legislative materials are inapposite. It is said that the nature of the orders reviewable under § 402(b) makes the grant of a stay order manifestly inappropriate since a stay would in effect involve the judicial exercise of an administrative function. An example is adduced of an appeal from an order denying an application for a construction permit or a station license, or for modification or renewal of a license. Of course, no court can grant an applicant an authorization which the Commission has refused. No order that the Court of Appeals could make would enable an applicant to go on the air when the Commission has denied him a license to do so. A stay of an order denying an application would in the nature of things stay nothing. It could not operate as an affirmative authorization of that which the Commission has refused to authorize. But this is no reason for denying the Court the power to issue a stay in a situation where the function of the stay is to avoid irreparable injury to the public interest sought to be vindicated by the appeal.

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402(b)(2) Congress gave the right of appeal to persons "aggrieved or whose interests are adversely affected" by Commission action. 48 Stat. 1064, 1093. But these private litigants have standing only as representatives of the public interest. *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470, 477. Compare *National Licorice Co.* v. *Labor*

[5] As late as February 23, 1939, the Commission stated its position as follows: "The Commission has not opposed in the past, and does not propose in the future to oppose the granting of a stay or such interlocutory restraining order by this court as may be necessary to protect the appellate jurisdiction of the court or preserve the *status quo* pending determination of an appeal from an order of the Commission, in any case where such a stay or restraining order appears reasonably to be necessary or advisable." Opposition to Petition for Stay Order filed by the Commission in Crosley Corp. v. Federal Communications Commission, No. 7351, Court of Appeals for the District of Columbia, Feb. 23, 1939, pp. 1-2.

Board, 309 U. S. 350, 362-63. That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry.* v. *Federation*, 300 U. S. 515, 552. An historic procedure for preserving rights during the pendency of an appeal is no less appropriate—unless Congress has chosen to withdraw it—because the rights to be vindicated are those of the public and not of the private litigants. Unless Congress explicitly discloses such an intention we should not lightly attribute to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard. To do so would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. *United States* v. *Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 164. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes.

It is urged that the orders reviewable under § 402(a), as to which the power to grant stays is undeniable, are intrinsically different from those reviewable under § 402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform. For example, if the Commission on its own motion modifies a station license, review is had under § 402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under § 402(b) to the Court of Appeals for the District of Columbia. Both cases give rise to the same kind of issues on appeal. Both orders are equally ~~suspectible~~ Susceptible of being stayed on appeal. As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commission's order arose out of a proceeding not instituted by the licensee.[6]

[6] See note 3, *supra*.

Judged by its own terms, its history, and the practice under it, the Communications Act of 1934 affords no warrant for depriving the Court of Appeals of the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal challenging its validity. Indirect light is sometimes cast upon legislation by provisions dealing with the same problem in related enactments. No such light is shed here. The numerous laws in which Congress has established administrative agencies for the exercise of its regulatory powers do not disclose any general legislative policy regarding the power to stay administrative orders pending review. Some statutes are wholly silent;[7] some turn a court review into an automatic stay;[8] some provide that the commencement of a suit shall not operate as a stay unless the court specifically so provides;[9] some authorize the reviewing court to grant a stay where necessary.[10] Significantly, the recent Emergency Price Control Act of 1942 explicitly denies the power of the reviewing court to enjoin enforcement of the administrative orders. Pub. Law 421, 77th Cong., 2d Sess.

The various enactments in which the staying power is made explicit, as well as the statutes that are silent about it, afford debating points but no reliable aids in construing the Act before us. One thing is clear. Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war.

We conclude that Congress by § 402(b) of the Communications Act of 1934 has not deprived the Court of Appeals of the power

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[7] E. g., Commodity Exchange Act of 1922, 42 Stat. 998, 1001, 7 U. S. C. § 9; Radio Act of 1927, 44 Stat. 1162; Railroad Retirement Act of 1937, 50 Stat. 307, 315, 45 U. S. C. § 228k.

[8] E. g., Federal Alcohol Administration Act of 1935, 49 Stat. 977, 980, 27 U. S. C. § 204h; Investment Company Act of 1940, 54 Stat. 789, 844, 15 U. S. C. § 80a-42(b).

[9] E. g., Agricultural Adjustment Act of 1938, 52 Stat. 31, 7 U. S. C. § 1367; Securities Act of 1933, 48 Stat. 74, 80, 15 U. S. C. § 77i; Trust Indenture Act of 1939, 53 Stat. 1175, 15 U. S. C. § 77vvv; Public Utility Act of 1935, 49 Stat. 803, 834, 15 U. S. C. § 79x; Investment Company Act of 1940, 54 Stat. 789, 844, 15 U. S. C. § 80a-42(b); Investment Advisers Act of 1940, 54 Stat. 847, 856, 15 U. S. C. § 80b-13; Fair Labor Standards Act of 1938, 52 Stat. 1060, 1065, 29 U. S. C. § 210(b); Bituminous Coal Act of 1937, 50 Stat. 85, 15 U. S. C. § 836(b); Natural Gas Act of 1938, 52 Stat. 821, 832, 15 U. S. C. § 717r(c).

[10] E. g., Civil Aeronautics Act of 1938, 52 Stat. 973, 1024, 49 U. S. C. § 646(d); Federal Trade Commission Act of 1914, 38 Stat. 719, as amended, 52 Stat. 111, 113, 15 U. S. C. § 45(c) (authorizing the court to issue such writs as "are necessary in its judgment to prevent injury to the public or to competitors pendente lite").

to stay—a power as old as the judicial system of the nation. We do not of course go beyond the question put to us. We merely recognize the existence of the power to grant a stay. We are not concerned here with the criteria which should govern the Court in exercising that power. Nor do we in any way imply that a stay would or would not be warranted upon the showing made by the appellant in this case.

The question certified to us is answered in the affirmative.

So ordered.

Mr. Justice BLACK took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 508.—October Term, 1941.

Scripps-Howard Radio, Inc., vs. Federal Communications Commission.	On Certificate from the United States Court of Appeals for the District of Columbia.

[April 6, 1942.]

Mr. Justice Douglas, dissenting.

Congress has provided through § 402(a) of the Communications Act of 1934 that in appeals from certain classes of orders of the Federal Communications Commission the appellate court may issue a stay. The order here involved is of a class which is expressly excepted from § 402(a). Sec. 402(b) which provides for an appeal from this class of order contains no provision whatsoever for a judicial stay. Where Congress in one section of an Act has provided for a stay of certain orders but not of others, it has not remained silent on the subject. It has drawn a line. And that line should not be obliterated by us in absence of plain and compelling indications that the purpose of Congress was different from what the face of the statute reveals. There are no such reasons here.

The legislative history gives no comfort to the view of the majority. In drafting § 402 Congress had before it H. R. 7716, 72d Congress. That bill, designed to amend the Radio Act of 1927, had been passed by both houses in 1933 but had failed of enactment because of a pocket veto. Under § 16(f) of that bill orders of the type here in question could be stayed by the appellate court. Congress relied extensively on that earlier bill in drafting § 402. H. Rep. No. 1918, 73d Cong., 2d Sess., pp. 47-49. If Congress had intended the appellate court to have the power to stay this type of order, it hardly seems likely, as the Commission points out, that Congress would have failed to include it, when only the year before it had attempted to write into the statute a specific provision conferring that power. But if we dis-

regard that circumstance and turn to other parts of the legislative history, there are no indications that the line which Congress drew between § 402(a) and § 402(b) was inadvertent or accidental.

Nor are we justified in rewriting the statute to iron out possible logical inconsistencies in the classification of orders which Congress has made in § 402(a) and § 402(b). If we were a legislative committee, perhaps we would not retain in § 402(a) orders which are made by the Commission on its own motion and which modify a station license, since such orders if made pursuant to an application are covered by § 402(b). But to seize on that lack of symmetry here is to miss the forest for the trees. The nature of the run of the orders excepted from the stay provisions of § 402(a) demands respect for the words of the Act. The instant case is a good illustration. *Federal Communications Commission* v. *Sanders Bros.*, 309 U. S. 470, holds that a competitor such as appellant has no private property interest which may be protected on appeal. "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *Id.*, p. 475. Any injury to an existing station as is alleged here "is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license." *Id.*, p. 476. Thus it is manifest that the failure of Congress to extend the stay provisions of § 402(a) to the run of orders of this type makes sense. The Urgent Deficiencies Act, which is incorporated into § 402(a), allows a temporary stay "where irreparable damage would otherwise ensue to the petitioner". 38 Stat. 208, 220. But where appeals under § 402(b)(2), as in the instant case, are not shown to involve private rights, analogies to situations where the power to issue a stay is implied because irreparable damage may be done an appellant whose individual interest has been unlawfully invaded are inapposite. For the same reason, statistics as to the presence of this power in statutes of other administrative agencies are irrelevant, in absence of a showing that in the precise situations there involved no private rights were at stake.

And that leads to a related reason why it will not do to lean on "the historic procedures of federal appellate courts" so that an implied power to issue a stay in this type of case may be found. "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of prop-

erty." *In re Sawyer*, 124 U. S. 200, 210. All constitutional questions aside (*Muskrat* v. *United States*, 219 U. S. 346) we should require explicit, unequivocal authorization before we permitted an appellant who has no individual substantive right at stake in the litigation to obtain a stay to protect the public interest. Repeated attempts of private litigants to obtain a special stake in public rights have been consistently denied: See *Massachusetts* v. *Mellon*, 262 U. S. 447; *Sprunt & Son* v. *United States*, 281 U. S. 249; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Atlanta* v. *Ickes*, 308 U. S. 517; *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295. The attempt to obtain a stay is but another manifestation, albeit oblique, of that same endeavor. Hence, instead of starting from the premise that an "historic power" to issue a stay in this type of case will be readily implied, we should assume just the contrary. Not even long acquiescence or approval on the part of the Commission should lead us to make such a departure from those historic, accepted principles. For that reason alone § 402(b) should be read narrowly and restrictively.

But it is said that Congress entrusted the vindication of the public interest to private litigants. The *Sanders* case properly construed merely means that the Court of Appeals has *jurisdiction* of appeals by a "person aggrieved" or by one "whose interests are adversely affected" by the Commission's decision. § 402(b). But that does not mean that an appellant has a cause of action merely because he has a competing station. Unless he can show that his individual interest has been unlawfully invaded, there is merely *damnum absque injuria* and no cause of action on the merits. *Alabama Power Co.* v. *Ickes*, *supra*; *Greenwood County* v. *Duke Power Co.*, 81 F. 2d 986, 999. And see *Duke Power Co.* v. *Greenwood County*, 302 U. S. 485. Congress could have said that the holder of a radio license has an individual substantive right to be free of competition resulting from the issuance of another license and causing injury. In that event, unlike the situation in *Muskrat* v. *United States*, *supra*, there would be a cause of action for invasion of a substantive right. But as we said in the *Sanders* case Congress did not create such a substantive right. And no facts are shown here which would bring this appeal outside the rule of that case. On that assumption I fail to see how an appeal statute constitutionally could authorize a person who shows no

case or controversy to call on the courts to review an order of the Commission. *A fortiori* he would have no standing to obtain a stay.

Furthermore, the power to issue a stay in this type of case cannot be found in the "all writs" statutes. Judicial Code, § 262; District of Columbia Code (1940 ed.) Title 11-208. As we stated in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, the relationship between the Court of Appeals and the Commission is not that of federal courts *inter se*. ". . . to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." p. 144. The Commission not the courts is the ultimate guardian of the public interest under this Act. The appellate court is limited to a correction of "errors of law". *Id.*, p. 145. The judgment of the Commission not the court determines whether the public interest will be served by an application. *Id.*, pp. 144-145. Hence the power of the courts in this situation to issue writs under the "all writs" statutes should be limited to the protection of its jurisdiction. If, as here, construction of a new station is completed pending appeal by another licensee, the court's jurisdiction is not impaired, though we assume that it has jurisdiction of the appeal and that appellant has a cause of action on the merits. If the Commission has committed an error of law, it must bow to the decree of the court and revise its order. But to allow the court to go beyond that and find an implied power to issue a stay in this type of case is to distort the statutory scheme. 12 Air L. Rev. 224. Jealous regard for the administrative role and function in this field will leave to Congress any enlargement within constitutional limits of the judicial power.

Mr. Justice MURPHY joins in this dissent.